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Twenty-fifth session

SUMMARY RECORD OF THE 468th MEETING

Held at Headquarters, New York,
on Monday, 4 May 1992, at 3 p.m.

Chairman: Mr. ABASCAL-ZAMORA (Mexico)

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International payments: draft Model Law on International Credit Transfers (continued)

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The meeting was called to order at 3.10 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/46/17; A/CN.9/346, 347 and Add.1 and 367)

Article 16

1. The CHAIRMAN said that, owing to a lack of support in the Commission, the representative of Germany had agreed to withdraw his objection to the notion of objective liability, on condition that his delegation's views were reflected in the record.

2. The Commission must determine whether paragraph (1) of article 16 should use the wording originally proposed by the Working Group on International Payments, as set out in annex I to the Commission's report on the work of its twenty-fourth session (A/46/17), or that proposed by the United Kingdom and Finland (A/46/17, para. 278). In addition, the representative of Germany had raised the question of extending liability to the originator when a financial transfer was not completed, a situation contemplated in paragraph (2 ter) of the United Kingdom/Finnish proposal.

3. Mr. FUJISHITA (Japan) said that his delegation would have no objection to paragraphs (1) and (2 ter), provided that the points he had raised at the previous meeting were dealt with properly when the Commission considered articles 16 (8) and 17 (1).

4. The CHAIRMAN, suggested that the Commission should adopt paragraph (1) and that paragraphs (1) and (2 ter) of the United Kingdom/Finnish proposal should be referred to the Drafting Group for further review.

5. It was so decided.

6. The CHAIRMAN suggested that the Commission should adopt paragraph (2).

7. It was so decided.

8. Mr. GREGORY (United Kingdom), referring to paragraph (2 bis) of the United Kingdom/Finnish proposal, said that the purpose of article 16 was to provide a structure in which the obligations in the Model Law that were essential to the operation of a credit transfer would have some liability attached to them. Paragraph (2 bis) was therefore necessary to explain that one of the failures that could incur liability under paragraph (1) was the failure to pay. He noted, however, that the word "pay" did not cover the debiting of a sender's account at the receiving bank, which could be done at any time.

9. If a rule obliged a bank to pay in a timely fashion, the appropriate time for such payment was when funds were available in the account. The rule was

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meant to apply to a bank that received money but held on to it even though it had issued a payment order consistent with the one received. Such a rule would clarify the obligations referred to in paragraph (1).

10. Mr. FELSENFELD (United States of America) said he was sympathetic to the objectives of the representative of the United Kingdom, but felt that paragraph (2 bis) would not accomplish them. He had a number of objections to that paragraph: for example, the paying bank must make payment to any receiving bank that accepted a payment order whether or not the sending bank had been paid. He was not sure what sanctions should apply if such was not the case. The reference to a delay caused by failure to pay was also unclear. A bank that issued a payment order that was accepted must cover that payment order, and failure to do so constituted a violation of the obligation. Whether or not failure to pay caused delay was irrelevant to the transaction. Finally, the Commission had already decided that no specific penalty would be provided for banks that were unable to pay.

11. Ms. KOSKELO (Observer for Finland) said that paragraph (2 bis) was not intended to deal with situations where a sending bank failed to execute a payment order already accepted by a receiving bank. The need for that paragraph arose from the fact that a bank that had received and accepted a payment order could delay the credit transfer in two ways: by executing the payment order too late, or by issuing its own payment order but failing to make payment available to the next bank. In the latter case, the next bank would not accept the order and delay would result.

12. The CHAIRMAN pointed out that article 4 (6) established that when a bank accepted a payment order, the sending bank must pay the receiving bank for that payment order. Article 7 (2) established the obligations of banks. If a bank accepted a payment order, the normal assumption was that that bank had the necessary funds. However, it could not hold up the transaction if funds were not available; having accepted the original payment order, it must then issue a new order. By failing to do so the bank was flouting its responsibilities.

13. Mr. BURMAN (United States of America) said that paragraph (2 bis) could pose real problems. The observer for Finland had said that the paragraph was not meant to deal with the case of a sending bank that failed to pay. In a credit transfer, however, a receiving bank that accepted a payment order and issued a new order of its own became by that very act a sending bank. The non-payment or delayed payment of such orders by receiving banks was in fact an illusory problem. The so-called failure to pay was actually credit, and billions of dollars went through banks' books without any "cover" ever having been provided. Article 4 (6) established an obligation to pay and that obligation need not be expanded.

14. To include paragraph (2 bis) in article 16 would interfere with the credit decisions made by receiving banks and would introduce complications

(Mr. Burman, United States)

into high-volume, high-speed credit transfers. In practice, receiving banks never matched incoming and outgoing payment orders on a one-to-one basis. Such an obligation would be very cumbersome to legislate.

15. Mr. JONES (United Kingdom) said that he was familiar with the practical problems raised by the United States representative. However, paragraph (2 bis) sought to impose an obligation that would prevent banks from issuing payment orders unless they could pay for them. The problem was in fact exacerbated by high-speed financial transfers, which were slowed tremendously by large numbers of transactions without cover. Consequently, his delegation's proposal sought to create a situation in which most payment orders were drawn on available credit and the flow of transactions was not slowed by a lack of credit.

16. Ms. KOSKELO (Observer for Finland) said that the new rule would not interfere with the credit decisions of receiving banks. If a receiving bank was willing to execute a payment order even though it had not been paid or had received assurance that it would get cover, no problem arose, except in the rare case where a receiving bank was not willing to give credit to the sender. The problem addressed in the proposal arose when a receiving bank was not prepared to execute a payment order without the assurance of cover: in that situation, a delay would be caused by the sending bank's failure to make cover available.

17. As to the objection that the new rule would create an operational burden arising from the need to match payments and payment orders, she stressed that the proposed rule merely sought to impute liability. Thus it did not imply the introduction of any features in the actual processing of payment orders.

18. Mr. DE BOER (Observer for the Netherlands) said that he favoured the United Kingdom/Finnish proposal. His delegation had submitted a proposal at the previous session that would have had the same result. Any delay that was caused because a bank had issued a payment order and had not provided cover must have a remedy. The draft Model Law had a lacuna in that respect.

19. Mr. JANSSON (Observer for Sweden) supported the views expressed by the observer for the Netherlands.

20. Mr. JONES (United Kingdom) said that the practical problems raised by the representative of the United States of America were not relevant to article 16. His delegation did not see any difference between a situation in which funds were actually available and one in which credit was given. While he agreed that payments were not matched on an individual basis, his delegation's proposal did not require any matching whatsoever. What was important was whether the receiving bank had actually received sufficient funds by any means; if so, and if it decided to accept payment and make another payment, it must not hold onto those funds.

21. Mr. BURMAN (United States of America) said that, unfortunately, ideas that sounded logical were colliding with commercial reality. The Commission was displaying an inclination to overregulate; and seeking to give some kind of legal imprimatur to the shadowy concept of cover. In the commercial world a wide variety of payment orders were executed because a bank along the chain, following its own commercial judgement, chose to accept and execute them. In the real world payment orders from a variety of countries often did not have money behind them. If the Commission's purpose was to promote trade and commerce, it should not revive the concept of cover. If it tried to overregulate the system, it would not have any influence in the growing world of computer-assisted banking.

22. Mr. FELSENFELD (United States of America) said that the draft Model Law had always been based on the simple idea that every credit transfer, whether there was cover or not, could be accepted or rejected by the receiving bank without restriction. There was no lacuna in the draft Model Law in that respect. In asking for cover, the receiving bank itself could create a delay; such a course of action would not be consistent with good credit practice or with the theme of the draft Model Law.

23. The CHAIRMAN said that the text of paragraph (2 bis) had gained very little support. Therefore, if he heard no objection, he would take it that the Commission decided not to include paragraph (2 bis) in article 16.

24. It was so decided.

25. Mr. BERGSTEN (Consultant to the Secretariat) said that since article 7 (3) had been deleted at the previous session, the reference to that article in paragraph (3) of article 16 should also be deleted. In paragraph (4), the reference to article 9 should read "paragraphs (2), (3) or (4)".

26. Mr. BHALA (United States of America) said that paragraphs (3) and (4) of article 16 dealt with notification duties that sometimes arose in the event of inconsistencies in payment orders. While the Commission had already considered certain aspects of that issue, it might wish to revert to it at some point.

27. Paragraphs (3) and (4) were adopted.

28. Ms. KOSKELO (Observer for Finland), speaking with reference to article 16 (5), said that she had difficulty with two aspects of the text proposed by the Working Group which were addressed in the proposal put forward by her delegation and that of the United Kingdom. Paragraph (5) provided for liability to the beneficiary for interest that was not placed at the disposal of the beneficiary on the payment date, so that liability in the case of partial delay would arise only if a payment date was specified in the payment order. That represented a deviation from the general rule set out in article 16 (1), which made a bank liable for interest regardless of whether the order contained a designated payment date.

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29. The last sentence of paragraph (5) also constituted a deviation from paragraph (1). All that needed to be said was that if only part of the amount to be transferred had been delayed, interest should be paid on the amount that was delayed.

30. Mr. GREGORY (United Kingdom) agreed with the views expressed by the representative of Finland.

31. Mr. EL-SHARKAWY (Egypt) noted that paragraph (5) provided for the same penalty as paragraph (1). However, while the liability in paragraph (1) was not based on fault but was an objective liability, that in paragraph (5) was based on fault because the amount in question was less than the amount of the payment order the receiving bank had accepted. The Model Law should differentiate between the two situations.

The meeting was suspended at 4.30 p.m. and resumed at 4.55 p.m.

32. The CHAIRMAN recalled that the Working Group had not discussed the principle reflected in the last sentence of paragraph (5). He therefore welcomed the solution which the United Kingdom/Finnish proposal offered to the problem of payment orders for lesser amounts.

33. Mr. DUCHEK (Austria) said that the United Kingdom/Finnish proposal was preferable to the Working Group's text. The expression "the receiving bank's improper action" was imprecise and should be avoided.

34. Mr.AZZIMAN (Morocco) said that he shared the concerns expressed by previous speakers. He had difficulty understanding the difference between a total and a partial failure to execute a payment order; the liability would be the same in both cases. He therefore supported the United Kingdom/Finnish proposal to reflect both situations in paragraph (1).

35. Mr. CHATURVEDI (India) said that his delegation's understanding of the proposal was that the last sentence of paragraph (5) should become the last sentence of paragraph (1); if that was correct, his delegation would support the proposal.

36. Mr. LE GUEN (France) agreed with the representative of Morocco: both situations should be reflected in paragraph (1).

37. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to delete paragraph (5).

38. It was so decided.

39. The CHAIRMAN said that paragraph (6) dealt with the liability of the beneficiary's bank towards the beneficiary under the applicable law. Once a

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credit transfer had been completed with the acceptance of the payment order by the beneficiary's bank, the relationship between the bank and the beneficiary no longer fell within the scope of the Model Law. The purpose of article 16 (6), then, was to ensure that the beneficiary's bank, in complying with the obligations imposed on it under articles 9 (1) and 9 (5) was not exempt from the liability provided for in article 16.

40. Mrs. AUGIER (France) expressed reservations concerning paragraph (6) which related to the notion of "completion" of a credit transfer as defined in article 17. Her delegation wished to ensure that a transfer would not be regarded as completed until the funds were available to the beneficiary.

41. Mr. LIM (Singapore) suggested that the reference to article 9 (1) or (5) should be moved to the beginning of paragraph (6) in order to make it clear that the liability in question related to the obligations under those paragraphs.

42. Paragraph (6) was adopted.

43. Mr. AL-NASSER (Saudi Arabia) said that the commercial banks in his country felt that paragraph (7) should be deleted, as it reflected an issue that was covered by the principle of contractual freedom.

44. Mr. CHATURVEDI (India) said that his delegation favoured the retention of the paragraph.

45. Mr. LIM (Singapore) noted that the paragraph had been omitted from the United Kingdom/Finnish proposal. If the intention was to give parties maximum contractual freedom, then the paragraph ought to be deleted, since it would limit the possibilities for varying the provisions of article 16.

46. Mr. GREGORY (United Kingdom) said that the authors of the proposal had not intentionally omitted paragraphs (6) and (7) from their redraft of article 16; new versions had not yet been submitted.

47. Mr. VASSEUR (Banking Federation of the European Community) said that the organization which he represented hoped that the Model Law would provide for maximum contractual freedom. Accordingly, the last sentence of paragraph (7) should be deleted, and it should be clearly stated that a bank could agree to increase or reduce its liability to an originator or beneficiary. As such decisions were related to cost, it should be left to the bank and the client to negotiate the scope of the bank's liability.

48. Drawing attention to paragraph 4 of the secretariat's comments on article 16 (A/CN.9/346), he noted that a comparison was made with conventions on the international carriage of goods. It would appear that where the carriers were jointly liable, the system of liability could be set aside by agreement between the parties. Such an arrangement would be appropriate with regard to the liability of a bank.

(Mr. Vasseur)

49. Furthermore, where an originator gave a formal payment order, requiring execution in a particular manner by a specific intermediary, the bank should not incur any special liability, and that, too, should be provided for in the text.

50. Lastly, the Banking Federation of the European Community wished to see the provisions of prior article 13 (A/46/17, para. 250) incorporated either into article 16 or into a separate article, so as to ensure that a bank would be exempted from all liability in case of force majeure.

51. The CHAIRMAN said that the Commission would in due course discuss the possible reintroduction of prior article 13. With regard to conventions on the international carriage of goods, to which the previous speaker had referred, all such conventions, to the best of his knowledge, provided for the liability of the various carriers to the shipper, but did not permit the carriers to agree to increase or reduce their liability to the shipper or the owner of the goods. In fact, carriers were prohibited from setting lower limits on their liability, to the detriment of the shipper or the owner of the goods, than those provided for in the convention.

52. Ms. KOSKELO (Observer for Finland) said that paragraph (7) had indeed been deliberately omitted, as the first two sentences of the paragraph were covered by article 3, and as article 16 (ter) provided that the bank's liability would be mainly to the beneficiary.

53. Mr. DE BOER (Observer for the Netherlands) said that if the provisions of paragraph 7 were deleted, circumstances might arise where a bank could reduce its liability to an absolute minimum. Such a situation would undermine the whole consensus that had been achieved on the Model Law. The paragraph was therefore not superfluous and should be retained.

54. The CHAIRMAN said he agreed with the representative of Finland that, in the light of the provisions of article 3 concerning freedom of contract, paragraph (7) was to some extent superfluous. However, he felt that the last sentence of the paragraph should be retained, even if the circumstances it covered were unusual. There was a possibility that a bank might attempt to reduce its liability to a non-bank beneficiary, and the prohibition in question was therefore required.

55. Mr. BURMAN (United States of America) said that the retention of paragraph (7) should be discussed further. It might also be necessary to return to paragraph (7) once a decision had been taken on paragraph (8), which also concerned liability.

56. Mr. AZZIMAN (Morocco) said that the final sentence of paragraph (7) was a useful measure which afforded protection to customers. The general liability of banks under the Model Law was already somewhat limited and the way should not be left open for further restrictions to be imposed. Furthermore, the

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clauses limiting liability might well be subject to different interpretations in different countries. The provision should therefore be maintained.

57. Mr. EL-SHARKAWY (Egypt) said that the final sentence of paragraph (7) was based on the assumption that a contractual relationship existed between the bank in question and the beneficiary. He could not imagine how such a relationship was possible.

58. The CHAIRMAN pointed out that the sentence in question referred not only to a beneficiary, but also to an originator, and that a contractual relationship between a bank and an originator was perfectly feasible.

59. In view of the broad support expressed for paragraph (7), he urged delegations having reservations to remember the spirit in which the Working Group had drafted the Model Law and asked whether they would be willing to accept the retention of paragraph (7) on the understanding that the Drafting Group would consider the necessity of the first two sentences in the light of the provisions of article 3 concerning freedom of contract.

60. Mr. CHATURVEDI (India) said that his delegation would prefer to retain paragraph (7) as it stood.

61. Mr. SCHNEIDER (Germany) said that the issue at hand was not merely a drafting matter; the full text should be maintained. The second sentence in particular was important in the context of the harmonization of provisions governing general conditions within the European Community.

62. The CHAIRMAN said that the Drafting Group would be asked to address the concern expressed by the representative of Germany.

63. Mr. BURMAN (United States of America) said that it should be made clear in the Commission's report that the inclusion of the second sentence of paragraph (7), and the fact that that provision did not appear elsewhere, should not be taken to mean that banks were not permitted to use standard terms of dealing with respect to other matters dealt with in other paragraphs.

64. The CHAIRMAN said that the Drafting Group would be asked to take note of that concern. Perhaps a reference thereto could be included in article 3, which was the most appropriate place.

65. Ms. KOSKELO (Observer for Finland) said that the question raised in the second sentence of paragraph (7) had also been discussed at the Commission's twenty-fourth session in connection with article 3. On that occasion, it had been decided not to include a reference to standard terms of dealing and to leave the question open. If a specific reference was made to standard terms of dealing, the question might arise as to how that provision related to other parts of the Model Law, thereby creating difficulties when the Model Law was adopted by national legal systems. It would therefore be best to omit the provision and leave the matter for individual countries to determine.

66. The CHAIRMAN suggested that the second sentence of paragraph (7) should be retained, in keeping with the decision of the Working Group, and that further consideration should be given to the possibility of including other stipulations in the standard terms of dealing. The Commission should also consider the possibility that, by stipulating very low interest rates, a bank could eliminate its liability under article 16 (7). In that case, either the sentence referring to freedom of contract in the definition of interest could be deleted, or appropriate language could be included in paragraph (7) of article 16.

The meeting rose at 6 p.m.